

Arnold & Porter

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January 19, 2024

David J. Smith, Clerk of Court
United States Court of Appeals for the Eleventh
Circuit
58 Forsyth Street, N.W.
Atlanta, GA 30303
(404) 335-6100

Re: Kenneth Eugene Smith v. Commissioner, Alabama Department of Corrections, and Warden, Holman Correctional Facility, No. 24-10095-P (CAPITAL CASE)

Dear Mr. Smith:

Counsel for Kenneth Eugene Smith submit this letter and attachments under FRAP 28(j) to advise the Court of significant information conveyed by Mr. Smith yesterday, which counsel reported to the Court during oral argument today.

Yesterday, after the 5 PM briefing deadline in this appeal, we obtained new information about Mr. Smith's health. Mr. Smith's attorney, Robert Grass, has prepared a declaration setting forth the additional information, which is Exhibit A to the notice that counsel has filed in the district court. Counsel also notified the State information before today's argument and requested the related medical records, which opposing counsel has agreed to provide, as shown in Exhibit B to the notice. All are attached as Exhibit 1 here.

The district court has been unable to consider the evidence because it was obtained only yesterday and the district court no longer has jurisdiction while this appeal is pending.

The evidence is relevant to Mr. Smith's Eighth Amendment claim and arguments to this Court that ADOC does not have adequate procedures in place to prevent painful asphyxiation from vomiting during the scheduled nitrogen hypoxia execution. Blue Br. 36–40; Grey Br. 16–19. Indeed, ADOC has admitted that, if Mr. Smith vomits while nitrogen is flowing, the State will let him choke on his own vomit. Blue Br. 40; DE 62–33 at 180:11–181:7; DE 67 at 88:17–89:1. The State further argued in its brief to this Court,

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filed this week, that concerns about Mr. Smith vomiting are speculative and that Mr. Smith “apparently never vomits.” Red Br. 10–11, 31–34.

Mr. Smith has always been at heightened risk of nausea and vomiting due to his diagnosed PTSD and the inherent risk from oxygen deprivation and nitrogen exposure. Mr. Smith’s past week of regular vomiting, his weight loss, and ADOC’s anti-emetic prescription demonstrate that his risk of vomiting is not speculative. Mr. Smith faces a high risk of superadded pain from the execution protocol.

Mr. Smith respectfully asserts that this new development further supports his Eighth Amendment claim and a stay of execution.

Respectfully Submitted,

/s/ Robert M. Grass

ROBERT M. GRASS
ARNOLD & PORTER KAYE
SCHOLER LLP
250 West 55th Street
New York, New York 10019-9710
(212) 836-8000

CERTIFICATION OF COMPLIANCE

I hereby certify that the body of this letter, submitted pursuant to Federal Rule of Appellate Procedure 28(j), contains 344 words, in compliance with Rule 28(j).

/s/ Robert M. Grass

Exhibit 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA**

KENNETH EUGENE SMITH,)
)
Plaintiff,)
) Case No. 2:23-cv-00656-RAH
v.)
) CAPITAL CASE
JOHN Q. HAMM, in his official)
capacity as Commissioner, Alabama)
Department of Corrections, and)
)
TERRY RAYBON, in his official)
capacity as Warden, Holman)
Correctional Facility,)
)
Defendants.)

NOTICE OF SUPPLEMENTAL EVIDENTIARY SUBMISSION

Plaintiff Kenneth Eugene Smith submits this notice of supplemental evidence.

On November 20, 2023, Mr. Smith filed a motion for preliminary injunction to prohibit Defendants from attempting to execute him on January 25, 2024, by nitrogen hypoxia using the Alabama Department of Corrections' Execution Procedures (August 2023). On December 20, 2023, the District Court for the Middle District of Alabama held an evidentiary hearing, and on January 10, 2024, the district court entered an order granting in part Defendants' motion to dismiss and denying Mr. Smith's motion for preliminary injunction. Later that day, Mr. Smith filed a timely notice of appeal.

Since that time, new evidence regarding Mr. Smith's health has developed. Because of the exigent circumstances surrounding the circumstances of Mr. Smith's incarceration and the imminent execution date, counsel is unable to obtain a declaration from Mr. Smith. We are, however, submitting as Exhibit A the declaration of Mr. Smith's attorney, Robert Grass, setting forth the additional information, which Mr. Smith provided counsel by telephone call yesterday. Earlier today, Mr. Smith's counsel Andrew Johnson informed the State of this information and requested that the State provide medical records regarding the circumstances and medical treatment of Mr. Smith described in Exhibit A, which opposing counsel has agreed to provide. *See* Exhibit B. Notice of this evidence is also being provided to the Eleventh Circuit Court of Appeals, which is presently considering Mr. Smith's appeal from the district court's order and request for a stay of execution.

Respectfully submitted,

/s/ Andrew B. Johnson
Andrew B. Johnson
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CUMMING LLP
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Birmingham, Alabama 35203
(205) 521-8000
ajohnson@bradley.com

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David A. Kerschner*

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Attorneys for Plaintiff Kenneth Eugene Smith

*admitted *pro hac vice*

CERTIFICATE OF SERVICE

I certify that on January 19, 2024, I electronically filed the foregoing with the Clerk of the Court using the Pacer system, which will send notification to the following:

Richard D. Anderson
Richard.Anderson@AlabamaAG.gov

Polly Spencer Kenny
Polly.Kenny@AlabamaAG.gov

Beth Jackson Hughes
Beth.Hughes@AlabamaAG.gov

Henry Mitchell Johnson
Henry.Johnson@AlabamaAG.gov

Jordan Shay Shelton
Jordan.Shelton@AlabamaAG.gov

John Coleman Hensley, III
John.Hensley@AlabamaAG.gov

Attorneys for Defendants

/s/ Andrew B. Johnson
Of Counsel

Exhibit A

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA**

KENNETH EUGENE SMITH,)
Plaintiff,) Case No. 2:23-cv-00656-RAH
v.) CAPITAL CASE
JOHN Q. HAMM, in his official)
Capacity as Commissioner, Alabama)
Department of Corrections, and)
TERRY RAYBON, in his official)
Capacity as Warden, Holman)
Correctional Facility,)
Defendants.)

**EXECUTION SCHEDULED FOR
JANUARY 25, 2024**

DECLARATION OF ROBERT M. GRASS

ROBERT M. GRASS declares under penalty of perjury:

1. My name is Robert M. Grass, and I am counsel for Plaintiff-Appellant Kenneth Eugene Smith. I am submitting this declaration to advise the Court of pertinent and significant information Mr. Smith conveyed to me yesterday.
2. Due to exigent circumstances resulting from his incarceration and the imminent execution date, Mr. Smith has not been able to submit his own signed declaration.
3. Yesterday evening, January 18, 2024, Mr. Smith called me by telephone from Holman Correctional Facility to state that he has been vomiting consistently for at least a week. He told me that, as a result of his vomiting, he has lost approximately eight pounds. He stated that the Alabama Department of Corrections has prescribed him Zofran, an anti-emetic, to help control the nausea and vomiting.

I declare under penalty of perjury that the foregoing is true and correct under 28 U.S.C. § 1746.

Dated: January 19, 2024

/s/ Robert M. Grass

ROBERT M. GRASS
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, New York 10019-9710
(212) 836-8000

Exhibit B

Johnson, Andy

From: Johnson, Andy
Sent: Friday, January 19, 2024 10:10 AM
To: Anderson, Richard; robert.grass@arnoldporter.com
Subject: RE: Smith Health Records

Rich –

We understand from our client that he has been experiencing symptoms over the past two weeks that have resulted in and include vomiting and weight loss. We further understand that he has sought and received medical care at Holman, and that the medical providers there have made a diagnosis and prescribed certain medication to him for these symptoms.

Will you please supplement your production of 12/8 to include these recent medical records?

Thank you –

Andy

Andrew B. Johnson

Partner | Bradley
ajohnson@bradley.com
d: 205.521.8295

From: Anderson, Richard <Richard.Anderson@AlabamaAG.gov>
Sent: Friday, December 8, 2023 4:28 PM
To: Johnson, Andy <AJohnson@bradley.com>; robert.grass@arnoldporter.com
Subject: Smith Health Records

Andy and Robert:

Please find attached what I believe to be an up to date health record for Mr. Smith, including his mental health file.

Rich

Richard D. Anderson
Capital Litigation Division
Office of the Attorney General
State of Alabama
501 Washington Ave.
Montgomery, AL 36130
(334) 353-2021

Andy and Robert:

Please find attached what I believe to be an up to date health record for Mr. Smith, including his mental health file.

Rich

Richard D. Anderson
Capital Litigation Division
Office of the Attorney General
State of Alabama
501 Washington Ave.
Montgomery, AL 36130
(334) 353-2021



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Johnson, Andy

From: Anderson, Richard <Richard.Anderson@AlabamaAG.gov>
Sent: Friday, January 19, 2024 5:21 PM
To: Johnson, Andy
Cc: robert.grass@arnoldporter.com; Hughes, Beth; LaCour, Edmund
Subject: Re: Smith Health Records

Andy,

I had a hearing in another case this morning, and didn't realize they should come in until OA. If you have an urgent request, generally, it is preferable to send it to everyone involved in the case, and/or to follow up with a phone call. Nevertheless, I have asked ADOC to check on Mr. Smith's medical records. I don't have any objection to providing them to you as soon as we have them, but that will likely not be until Monday.

Rich

Sent from my iPhone

On Jan 19, 2024, at 10:09 AM, Johnson, Andy <AJohnson@bradley.com> wrote:

This message has originated from an **External Source**. Please use proper judgment and caution when opening attachments, clicking links, or responding to this email.

Rich –

We understand from our client that he has been experiencing symptoms over the past two weeks that have resulted in and include vomiting and weight loss. We further understand that he has sought and received medical care at Holman, and that the medical providers there have made a diagnosis and prescribed certain medication to him for these symptoms.

Will you please supplement your production of 12/8 to include these recent medical records?

Thank you –

Andy

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Partner | Bradley
ajohnson@bradley.com
d: 205.521.8295

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